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No. 88-1302

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

PATRICIA BOHATCH, *et al.*,
Petitioners,

v.

CHARLOTTE V. DELHAES, M.D., *et al.*,
Respondents.

On Petition For Writ of Certiorari To the Court of Appeals, Eleventh Appellate District, Lake County, Ohio

REPLY BRIEF

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A.

THE MANNER IN WHICH PETITIONERS RAISED THEIR CONSTITUTIONAL CLAIMS DOES NOT BAR THIS COURT FROM REVIEWING THOSE ISSUES PURSUANT TO ITS CERTIORARI JURISDICTION.

Petitioners argued in the trial court, and in every subsequent appeal, that Ohio's "reasonable person" consent standard destroys the patient's "right of sovereignty", so as to deprive the patient his right to redress in the courts.

Although early opinions of this Court seemed to require that a specific constitutional issue was "pressed or passed upon below" as jurisdictional, more recent cases clearly view the rule as merely a "prudential restriction" that does not pose an insuperable bar to (the Supreme Court's) review". *Illinois v. Gates*, 462 U.S. 213, 76 L.Ed.2d 527, 103 S.Ct. 2317 (1983); *Banker's Life and Casualty Co. v. Crenshaw*, ___ U.S. ___, 100 L.Ed.2d 62, 108 S.Ct. 1645 (1988).

Therefore, the manner by which this issue was raised in the trial court and in the Ohio appellate courts does not bar this Court from reviewing the matter pursuant to its certiorari jurisdiction.

B.

OHIO'S APPLICATION OF AN OBJECTIVE CONSENT STANDARD MANIFESTLY VIOLATES THE PETITIONERS' CONSTITUTIONAL RIGHTS, AND BECAUSE THERE IS A MAJOR DIVERGENCE OF DECISIONS THROUGHOUT THE UNITED STATES AS TO WHETHER THE INFORMED CONSENT STANDARD SHOULD BE OBJECTIVE OR SUBJECTIVE, THIS COURT SHOULD REVIEW THIS ISSUE AS A MATTER OF FUNDAMENTAL CONSTITUTIONAL IMPORTANCE.

Both the Petition for Writ of Certiorari and the opposing brief in this matter indicate that many states have

chosen the objective standard of informed consent, while others have chosen the subjective standard. Petitioners have cited approximately a dozen states that favor Petitioners' approach, and Respondents have cited approximately the same number which support the objective standard of consent. Still other states have not yet passed upon this issue.

The issue of informed consent touches the lives of every person in the United States, and, depending upon where she is treated, a patient's constitutional rights will either be preserved or violated.

This is exactly that sort of divergence of constitutional opinion on which this Court's judgment is needed.

The informed consent law of Ohio and a majority of states does deprive an individual of privacy, due process of law, and equal protection, and the Petition for Writ of Certiorari should be granted.

CONCLUSION

For these reasons and for the reasons advanced in the Petition for Writ of Certiorari, the writ should be granted.

Respectfully Submitted,

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